

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW YORK UNIVERSITY
Employer

and

Case 02-RC-023481

GSOC/UAW
Petitioner

ORDER

Petitioner's Request for Review of the Acting Regional Director's Decision and Order Dismissing the Petition is granted as it raises substantial issues warranting review. See *New York University*, 356 NLRB No. 7 (2010) (granting review, finding (1) compelling reasons for reconsideration of *Brown University*, 342 NLRB 483 (2004); (2) factual and legal questions regarding the status of graduate students who provided research assistance funded by external grants; and (3) significant unit placement issues). Employer's Conditional Request for Review of the Acting Regional Director's findings regarding the appropriate unit is granted as it raises substantial issues warranting review. The Employer's conditional request for review is denied in all other respects.¹

MARK GASTON PEARCE,	CHAIRMAN
RICHARD F. GRIFFIN, JR.,	MEMBER
SHARON BLOCK,	MEMBER

Member Hayes, dissenting:

Today the Board grants review in this case and in *Polytechnic Institute of New York University*, Case 29-RC-12054, and invites *amici curiae* to file briefs addressing the Petitioner's argument that *Brown University*, 342 NLRB 483 (2004), should be overruled. The Board in *Brown* found that graduate student assistants are not employees under Section 2(3) of the Act because they "perform services at a university in connection with their studies, [and thus] have a predominantly academic, rather than economic, relationship with their school." *Id.* at 483.

¹ Contrary to our dissenting colleague, we believe that significant factual and legal issues concerning the Acting Regional Director's Decision are raised by the Petitioner's request for review and the Employer's conditional request for review, and that review by the Board is therefore appropriate.

The Petitioner, in both *NYU* and *Polytechnic*, urges the Board to reconsider and overrule *Brown*. Even after an evidentiary hearing in this case,¹ it is readily apparent that there is no factual basis for granting review and that the Acting Regional Director correctly applied *Brown* to dismiss the petition once again. Further, the issue whether there are compelling circumstances warranting a grant of review is in no different posture than before the hearing. The asserted compelling reason for reconsidering *Brown* consists of nothing more than a change in the Board's membership. Thus, the request for review in this case and *Polytechnic* simply recycle arguments made by the dissenters and rejected by the majority in *Brown*.

The evidentiary remand gambit having failed, the majority now bends to assist the Petitioner once more by granting review and inviting *amici* to file briefs. Perhaps this venture will yield something more than two academic studies, one of which was unpublished and both of which are, as the Acting Regional Director's Decision seemed to recognize, of questionable value. Even absent any supplemental information or argument of significance, there is the distinct possibility that my colleagues will change the law in this area for the third time in twelve years. Such a course would tend to undermine both the predictability inherent in the rule of law as well as the Board's credibility.² It would also impermissibly distort both labor relations and student relations stability in the higher education industry.

For all the foregoing reasons, as more fully expressed in my dissent to the prior remand Order,³ I would deny review and dismiss the petitions in both *NYU* and *Polytechnic*.⁴

BRIAN E. HAYES,

MEMBER

Dated, Washington, D.C., June 22, 2012.

¹ See *New York University*, 356 NLRB No. 7 (2010).

² “[A]n agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is entitled to considerably less deference than a consistently held agency view.” See *New York University*, 356 NLRB No. 7, slip op. at 2 fn. 1 (2010) (Hayes, diss.) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 fn. 30 (1987) (citations and internal quotations omitted)).

³ 356 NLRB No. 7, slip op. at 2-3.

⁴ Inasmuch as the majority grants the Petitioners’ requests for review, I join them in granting in part the Employer’s conditional request for review in *NYU*, and the Employer’s request for review in *Polytechnic*.